Non-paper from the Netherlands on the consultation
'Empowering the national competition authorities to be more effective enforcers'

Introduction

The Netherlands welcomes the opportunity to share its views on how to empower the national competition authorities (NCAs) to be more effective enforcers. Independent and effective enforcement of EU competition rules by NCAs is essential to maintain competition in the European Single Market.

The basic conditions for effective enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) should be guaranteed throughout the EU. While the Dutch competition authority is well-equipped to safeguard its independence, set adequate fines, and enforce infringements effectively, the Netherlands supports the Commission's efforts to explore opportunities to further strengthen effective enforcement of all NCAs.

If the outcome of the questionnaire begs for EU-wide intervention, the Netherlands considers non-legislative measures such as reinforcing the European Competition Network (ECN) and exchanging best practices through the ECN, and/or using Commission recommendations, to be first appropriate steps. If such measures prove insufficient, the Netherlands may – subject to proportionality requirements – take a positive attitude towards institutionalising the starting point that all NCAs should have adequate resources and tools and should be independent when enforcing EU competition rules.

Commission questionnaire

Under Regulation 1/2003, NCAs and nationals courts must apply EU competition rules when agreements or conduct are capable of affecting trade between Member States. This has significantly enhanced the enforcement of EU competition rules by NCAs and national courts.

The procedures for the application of EU competition rules by NCAs are largely governed by national law. The Communication from the Commission to the European Parliament and the Council "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives" (COM(2014) 453 final) indicates that as a result the EU competition rules are applied on the basis of different procedures, and that this poses a problem.

With the questionnaire the Commission would like to gather views on how to ensure that NCAs:

1. can act independently when enforcing EU competition rules and have the resources and staff needed to do their work;
2. have an adequate competition toolbox to detect and tackle infringements;
3. can impose effective fines on companies which violate the rules; and
4. have leniency programmes, which encourage companies to come forward with evidence of illegal cartels, that work effectively across Europe.

As a supplement to the answers given in the questionnaire, this non-paper sets out the position of the Netherlands on these subjects.

The Dutch competition authority is independent and has adequate resources and tools

The Netherlands agrees with the Commission that NCAs should act independently, have adequate resources and an adequate toolbox, and can set effective fines. The toolbox should include a leniency programme.

To safeguard independence of the NCA in the Netherlands, the Dutch Minister of Economic Affairs - who is politically responsible for the Dutch competition authority - is prohibited from giving instructions to the authority in individual cases or annulling the authority's decisions in individual cases. In addition, the authority has sufficient resources to perform its tasks independently. Dismissal

of members of the board can only take place on objective legal grounds unrelated to its enforcement activities.

Besides those guarantees the Dutch competition authority is provided with an adequate toolbox. It is empowered to inspect business and non-business premises, to effectively gather digital evidence, to request information, and to impose fines. The authority therefore has at its disposal a complete toolbox with effective investigation and decision-making powers to enforce EU competition rules.

As for leniency, the Netherlands acknowledges the benefits of a leniency programme. The Dutch leniency rules are based on the ECN Model Leniency Programme.

Last, to further enhance the effectiveness of enforcement the Dutch Minister of Economic Affairs has proposed legislation to raise the legal maximum of fines the authority can impose. This proposal is currently in the process of being adopted.

Appropriate measures for effective enforcement
While the system in the Netherlands respects the importance of independence and adequate resources and tools, there may be room for improvement throughout the EU to pursue these goals.

The Netherlands notes that procedures for the application of EU competition rules by NCAs are largely governed by national law. Although differences in systems of competition enforcement and tools NCAs use to apply the EU competition rules do not necessarily imply a less optimal application of Articles 101 and 102 TFEU, the basic conditions for effective enforcement of Articles 101 and 102 TFEU should be guaranteed throughout the EU.

If this cannot be achieved without European intervention in all Member States, the Netherlands believes that measures are appropriate. Strengthening the cooperation within the framework of the ECN and exchanging best practices in combination with Commission recommendations to individual Member States could be first suitable steps. The Netherlands believes that this would bolster effective enforcement of EU competition rules while respecting legitimate divergences.

If these measures prove insufficient and the principle of proportionality is satisfied, European legislation is deemed appropriate. If so, the Netherlands would advocate goal-based regulation, providing the starting point that NCAs should have adequate resources and tools and should be independent when enforcing EU competition rules. It is then up to the Member States to formalise this in their national legal regimes with respect for their specific legal traditions. The Commission should enforce the implementation of these national open standards.

The Netherlands emphasises that possible EU measures should accommodate the application of Articles 101 and 102 TFEU without derogating from the institutional and procedural autonomy of the Member States with regard to the positioning and organisation of the NCAs and the ministerial responsibility for NCAs.